IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.1086 OF 2005

IN

NOTICE OF MOTION NO. 3059 OF 2005

in

SUIT NO. 2769 OF 2005

Sun Pharmaceutical Industries Ltd. .. Appellants

versus

Vikasco Rubber Products (India)

and others .. Respondents

...

Mr.Janak Dwarkadas a/w Mr.M.P.S. Rao i/b M/s.Sanjay Udeshi & Co. for the appellants.

Mr.Virag Tulzapurkar i/b Mr.R.G. Singh for the respondents.

**CORAM : R.M. LODHA AND**

**D.G. KARNIK, JJ**

**DATED : 20th December 2005.**

P.C.:

Heard Mr.Janak Dwarkadas, the learned Senior Counsel for the appellant and Mr.Virag Tulzapurkar, the learned counsel for the respondent nos.1 to 3.

2. Admit.

3. The respondents are the original plaintiffs. In the suit for redemption of mortgage and return of title deeds, they prayed that preliminary decree be passed declaring that the amount as mentioned in Exhibit-P annexed with the plaint is due and payable by the plaintiffs to the defendants and in alternative that preliminary decree be passed ordering that an account be taken of what is due to the defendants at the date of the decree for principal amount on the mortgage and then final decree for redemption of mortgage directing payment of the mortgage deed found due to the defendants and return of all title documents relating to the subject premises from the defendants to the plaintiffs be passed.

4. During the pendency of that suit, the Notice

of Motion was taken out by the plaintiffs praying therein that plaintiffs may be permitted to deposit a sum of Rs.4,73,05,334/- and the defendants be directed to hand over the title documents pertaining to the subject premises to the plaintiffs and for appointment of Court Receiver and injunction.

5. The learned Motion Judge by the order dated 24th October 2005 disposed of the Notice of Motion and ordered that upon plaintiffs depositing a sum of Rs.8 crores and further undertaking that they would pay further decretal amount, the title documents lying with the defendants be released and for that purpose, appointed a Court Receiver, High Court, Bombay with the direction to take possession of the title documents as set out in Exhibit-B to the plaint and hand over the same to the plaintiffs. The defendants were given liberty to withdraw a sum of Rs.4,73,05,334/- without prejudice to the rights and contentions.

6. Upset by the order dated 24th October 2005, the defendants have come up in appeal.

7. In our considered view, the order dated 24th October 2005 is unsustainable and has to be set aside.

8. Order XXXIV Rule 7 of the Code of Civil Procedure provides for passing of a preliminary decree in a suit for redemption ordering the account to be taken of what is due to the defendants at the date of the decree and then declaring the amounts due at that date and further direction to the plaintiff that if plaintiff pays in the Court the amount so found or declared due and all other costs, charges and expenses, the defendant shall deliver upto the plaintiff all documents in his possession or power relating to the mortgage property. How could the learned Motion Judge at the interim stage order the release of the title documents even when the plaintiffs have not succeeded in getting the accounts are yet to be taken and the amount due is yet to be found and declared. The whole approach in consideration of the matter is erroneous.

9. The learned counsel for the plaintiffs (respondents herein) submitted that the order came to be passed by the learned Motion Judge as the plaintiffs agreed to deposit the amount of Rs.8,92,47,692/- which according to the defendants was due and payable on that date. We find that there is serious dispute between the parties as to the amount due and payable by the

plaintiffs to the defendants as on date. According to Mr.Janak Dwarkadas, the learned Senior Counsel for the defendants, two statements were submitted by the defendants to the learned Motion Judge showing the amount due and payable by the plaintiffs to the defendants. In one statement, amount of Rs.8,92,47,692/- was shown as due and payable and in the other a sum of Rs.17,34,15,912/- was shown as due and payable by the plaintiffs on that date. Mr.Virag Tulzapurkar, the learned counsel for the plaintiffs seriously disputes that two statements were handed over by the advocate for the defendants to the learned Motion Judge. He would submit that in the memo of appeal, the appellants - defendants have not even stated that two statements were tendered before the learned Motion Judge. It is not necessary to go into this controversy as in our considered view, the procedure contemplated under Order XXXIV Rule 7 of the Code of Civil Procedure has to be followed before the documents of title of the subject properties (mortgage properties) could be ordered to be delivered upto the plaintiffs by the defendants. How can on deposit of sum of Rs.8 crores, when according to the defendants the due amount payable by the plaintiffs to the defendants is much more, the defendants be asked to

deliver up to the plaintiffs the documents relating to the mortgage property during pendency of suit for redemption of mortgage.

10. The impugned order dated 24th October 2005, therefore, has to be set aside and we order accordingly.

11. The appeal, accordingly, allowed with no order as to costs. It is always open to the plaintiffs to apply to the learned trial Judge for passing the preliminary decree and upon such application being made, obviously, the trial Judge shall proceed with the matter in accordance with law.

**(R.M. LODHA, J)**

**(D.G. KARNIK, J)**